In the Supreme Court

OF THE

United States

Supreme Court, U. S.
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OCTOBER TERM, 1942

No. 759

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION (a national banking association),

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

REPLY BRIEF OF PETITIONER BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION.

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I.

PRELIMINARY STATEMENT.

The brief for the National Labor Relations Board in opposition is to a very large extent an argument of the factual issues rather than a presentation of

legal reasons why a writ of certiorari should not be granted. Such a brief does not conform to our view of Rule 38. Accordingly, we make no reply to such factual discussion, but do reply for the purpose of correcting certain misstatements and clarifying certain ambiguous language.

II.

MISSTATEMENTS.

(a) As to issue of lack of due process.

During the hearing it appeared that there were certain documents in the possession of the Board or its attorneys, including statements made by the complaining witnesses approximately two years before the hearing and immediately subsequent to the acts concerning which complaint was made. The Petitioner requested a subpoena *duces tecum* in which it sought to have the statements in question either produced or submitted to it for its inspection. The purpose of the Petitioner in requesting the statements was to enable it to properly cross-examine the witnesses and to show that the said witnesses at a previous time when the transactions were fresh in the witnesses' minds had made statements under oath in conflict with the statements made before the trial examiner.

The subpoena was denied and the Petitioner raised the issue of due process. (R. 1321, 315, 316.) On this matter the Board's brief erroneously states:

> "Whether the Board's refusal of subpoenas for the production of immaterial evidence or privi-

leged documents constitutes a denial of due process." (Brief in Opp., page 3.)

The question presented by the subpoena is whether or not a defendant in an administrative proceeding is entitled to cross-examine the witnesses against him for the purpose of developing the truth. The evidence was not immaterial. It was most essential to Petitioner in the exercise of its right of cross-examination; its denial constituted lack of due process. Nor does the claim of the Board that these statements were privileged have any weight. There is no statute that has been called to our attention or any case cited by the Board holding that these statements are privileged. In any event whatever privilege might have attached to these documents must be disregarded in the ascertainment of truth.

Again the Board, in its brief, states:

> "There is no merit to the contention that petitioner was denied a fair trial because it was refused a subpoena for the production from the Board's file of prior written statements of Board witnesses not used in the hearing and of correspondence relating to prior settlement negotiations." (Brief in Opp. p. 19.)

The record will demonstrate that the witnesses who made the statements were called on behalf of the Board. It is also clear from the record that the written statements were in the possession of the attorneys for the Board at the hearing. (R. 842, 862.) It is inconceivable that under these circumstances that said state-

ments were not used for the purpose of framing questions and refreshing the recollection of the witnesses. Therefore the Board had unrestricted use of the statements, while the Petitioner was denied the constitutional right of using the statements in cross-examination. That these statements were admissible on cross-examination for the purpose of impeachment is a well settled rule of law. (*Wigmore on Evidence,* Second Edition, Section 1017, et seq.) It is likewise well settled that in an administrative proceeding a respondent is entitled to the right of cross-examination. (*I. C. C. v. L. & N. R. Co.* (1913), 227 U. S. 88.) This denial of the right of cross-examination is even more flagrant because the denial was made by a Board which was at the same time Petitioner's judge and adversary.

(b) Other misstatements.

As typical of other misstatements, attention is called to the following in relation to the alleged anti-union attitude of the Bank:

> "During the course of the organizational campaign one of petitioner's officials asserted that the charging union should not have joined the Congress of Industrial Organizations and that it would not be successful because of the radical constituency of that organization." (Brief in Opp. p. 7.)

The implication in the above language that the statement was made during the course of an organizational campaign is not true; it took place between an officer and an employe of Petitioner who were working in the

same department, and who were discussing various subjects and giving their personal views with regard thereto. The conversations had nothing to do with the duties of the participants within the scope of their employment. The officer had no connection with or control over personnel matters. During such conversations economic questions, opera and other matters of general interest were discussed by these employes. (R. 1262.)

But even if this conversation were authorized by the Petitioner, and were, as erroneously alleged by the Board, carried on "during the course of the organizational campaign", the opinion expressed by the officer was one that was held by many persons, and was reflected in current newspapers and magazines; and in any event it was an opinion, whether correct or incorrect, which, under the Constitution, the Petitioner or its employes had a right to hold, and moreover, to express freely. This Court has so held in *N. L. R. B. v. Virginia Electric & Power Co.* (1941), 314 U. S. 469, 477.

In addition, the favoring of one major labor organization over another would not seem to imply any union hostility. The use of this conversation to show anti-union bias is as preposterous as the use for the same purpose of the opinion of Bank's counsel that the Act was not applicable to Petitioner. (Brief in Opp., page 7.)

III.

THE INFIRMITIES IN CASE 758 ARE INHERENT IN INSTANT CASE.

The Board in its brief in opposition (page 21) has argued that the lack of due process in the companion case, No. 758, should not be imputed to this case.

We submit that even a cursory consideration of the two cases will demonstrate the error of the Board's position. The parties in the two cases were the same. The Board that denied due process in the first case was the same Board which decided the second case. The anxiety of the Board to get jurisdiction of National Banks was the same. Both cases were consolidated in the Court below and were submitted to the Circuit Court of Appeals on a consolidated brief. Under these circumstances it taxes human credulity to believe that the Board which went to the extremes which we have shown in Case No. 758 to deny to the Petitioner a fair trial, could have tried the second case fairly and impartially. But as we have heretofore pointed out, the Board in the second case was still determined to deny to the Petitioner its constitutional rights as shown by its acts in denying the subpoena for the purpose of producing documents which would have permitted an effective cross-examination.

IV.

THE JURISDICTIONAL QUESTION.

It is sufficient to point out on the jurisdictional question that the Board's brief cites no case holding that the activities of banking constitute interstate commerce, or "affect commerce" as that expression is used in the National Labor Relations Act. In our brief on the other hand, we have cited many cases holding that the functions and activities engaged in by national banks do not constitute commerce; therefore, there is no challenge to our contention that an important question of Federal law is involved which has not been, but should be settled by this Court, and, further, that there is apparent conflict in decisions with regard to the question.

WHEREFORE, Petitioner prays that the writ of certiorari be granted for all of the reasons and upon all of the grounds set forth in its petition.

Dated, San Francisco, California,
March 29, 1943.

Respectfully submitted,
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